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No. 84-577

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLIFTON L. GOODRICH, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Merit Systems Protection Board did not commit legal error or abuse its discretion in determining that the award of attorney fees to a union under 5 U.S.C. 7701(g)(1) in connection with its representation of a federal employee should be limited to the expenses the union incurred in providing the services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 733 F.2d 1578. The decision of the Merit Systems Protection Board (Pet. App. 7a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on May 9, 1984. A petition for rehearing was denied on July 12, 1984 (Pet. App. 23a). The petition for a writ of certiorari was filed on October 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's federal civil service position with the Department of the Navy was downgraded effective January 27, 1980 (Pet. App. 1a; 686 F.2d 169, 170 (3d Cir. 1982)). Petitioner appealed the agency action to the Merit Systems Protection Board (MSPB), which dismissed his appeal for lack of jurisdiction (Pet. App. 1a). The United States Court of Appeals for the Third Circuit vacated the decision and remanded the case to the MSPB. On February 8, 1983, the presiding official issued a decision finding that petitioner had been downgraded because his duties had gradually eroded over a period of years or, alternatively, that his former position was abolished due to a reorganization. The presiding official concluded that, under either alternative, the Department of the Navy had erroneously failed to apply reduction-in-force procedures, and he therefore ordered the Department to cancel the downgrading (Pet. App. 7a).

2. a. On April 4, 1983, petitioner's attorney, Charles Hobbie, filed a motion with the MSPB for payment of attorney fees (Pet. App. 8a). Mr. Hobbie is a staff counsel with the union of which petitioner is a member, the American Federation of Government Employees (AFGE) (*id.* at 2a). In the application for attorney fees, Mr. Hobbie sought compensation to be paid to AFGE at the rate of $75 per hour for his services, which, he stated, "represents the market hourly rate for an attorney of his experience" (*ibid.*). The total fee sought by AFGE through Mr. Hobbie was $3,675 (*ibid.*). Mr. Hobbie represented that the AFGE had "establish[ed] [a] Legal Representation Fund into which any attorney

fees awarded AFGE attorneys are paid" and that "[t]hese monies are under the sole control of AFGE's General Counsel and are to be used solely for legal work" (*ibid.*). He conceded, however, that "[t]he Legal Representation Fund does not contain enough money to pay for all of AFGE's legal work. General funds must also be used" (*id.* at 5a).

b. The governing statute, 5 U.S.C. 7701(g)(1), authorizes the MSPB to "require payment by the agency involved of reasonable attorney fees incurred by an employee" if the employee is the prevailing party and the MSPB determines that "payment by the agency is warranted in the interest of justice * * *."[1] In determining the amount of attorney fees to be awarded, the MSPB ordinarily applies the principle that the fees should be based upon the attorney's customary hourly rate multiplied by the number of hours expended, with any adjustments that are appropriate in light of special factors in the particular case. *Powell* v. *Department of the Treasury*, 8 M.S.P.B. 21 (1981); *Kling* v. *Department of Justice*, 2 M.S.P.B. 620, 624-628 (1980). However, in two prior decisions relied upon by the MSPB in this case, the MSPB held that any award of attorney fees to a union should be calculated on the basis of the union's expenses in supplying the legal services rendered. *Wells* v. *Schweiker*, 12 M.S.P.B. 329 (1982); *Powell* v. *Department of the Treasury*, *supra*. The MSPB adopted this approach for two reasons.

First, the MSPB concluded that when a salaried union employee renders legal services, the fee paid

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[1] The MSPB has held that attorney fees are "incurred by an employee" if they are incurred on his behalf, even though he does not pay them. *O'Donnell* v. *Department of Interior*, 2 M.S.P.B. 604 (1980).

to the union should be measured by a "salary-plus-overhead" or "cost-plus" approach rather than attempting to assign a market value to the lawyer's services, because the latter method would result in the payment of excess fees to the union and thus raise concerns about the unauthorized practice of law. See *Powell*, 8 M.S.P.B. at 25-28. In *Wells*, the MSPB concluded that the maintenance of a segregated legal fund by the union did not resolve this ethical concern, at least where payment into such a fund would reduce the amount of its general funds the union must devote to providing legal services, because such a fund is simply a means by which the union could do indirectly what it could not do directly. 12 M.S.P.B. at 331.

Second, the MSPB rejected market value awards to unions because to award more to a union than is available under a "salary-plus-overhead" or "cost-plus" approach would provide the union with a windfall profit for the performance of legal services. This, the M.S.P.B. concluded, would contravene the congressional purpose simply to "make whole" employees who have suffered losses in salary and benefits as the result of improper personnel actions. *Wells*, 12 MSPB at 331-333.

c. In an addendum decision issued on June 3, 1983, the MSPB held that AFGE satisfied the statutory requirements for an award of attorney fees (Pet. App. 7a-21a). In accordance with its prior decisions in *Powell* and *Wells*, the MSPB calculated the fee on the basis of the number of allowable hours Mr. Hobbie had expended on the case, multiplied by his hourly rate of salary from the union (*id.* at 2a, 12a-14a). This formula yielded a total fee of $979.32 for 43.5 hours. Again in accordance with its prior decision in *Powell*, the MSPB then increased this

amount by 100% to reflect the union's overhead costs (*id.* at 2a-3a, 14a n.6, 18a-19a). This resulted in a total fee award of $1,958.64, which the MSPB ordered the Navy to pay to the AFGE's Legal Representation Fund (*id.* at 19a).

3. On petition for review pursuant to 5 U.S.C. 7703(b)(1), the United States Court of Appeals for the Federal Circuit held that the MSPB did not commit legal error or abuse its discretion in basing the attorney fee award on the expenses the union incurred in providing the services (Pet. App. 6a). The court of appeals held that placement of the attorney fees in the union's Legal Representation Fund did not resolve the ethical problem inherent in paying the union more than that amount, explaining (Pet. App. 5a-6a):

> At least to the extent the union uses its general funds to pay the legal services it furnishes to its members, the vice the court of appeals in [*National Treasury Employees Union* v. *Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981)] and the Board in *Powell* found in the payment to the union of a fee based upon the market value of the attorney's services also would exist in such payment under the present fund arrangement. By reducing the amount of its general funds the union is required to use to provide legal services, the payment to the fund of legal fees that exceed the union's expenses of providing the services would result in the union's indirectly utilizing legal fees for its ordinary expenses.

However, the court of appeals expressly "intimate[d] no view on whether a different result might be appropriate if a legal representation fund fully supported the union's legal services program" (*id.* at 6a).

In addition, the court of appeals rejected petitioner's argument that this Court's decision in *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), mandated a different result. First, the court observed that in *Blum*, the entire fee went to a nonprofit law office, the Legal Aid Society of New York; in this case, by contrast, part of the fee would inure to the benefit of a nonlegal organization, the union. Second, the court reasoned that public policy favors awards of attorney fees in cases such as *Blum* in order to encourage and facilitate the bringing of suits to protect and vindicate civil rights; the court found no comparable public policy to encourage the institution of suits by federal employees challenging adverse personnel actions taken against them. Pet. App. 6a.

ARGUMENT

The court of appeals in this case concluded that the Merit Systems Protection Board did not commit legal error or abuse its discretion in calculating an award of attorney fees under the special statute applicable in MSPB proceedings, 5 U.S.C. 7701(g)(1), on the basis of the expenses actually incurred by the union in furnishing the legal services. That decision, rendered by the court of appeals in which Congress vested exclusive jurisdiction to review MSPB decisions, is correct and does not conflict with any decision of this Court or of another court of appeals. Further review by this Court is not warranted.

1. The issue of the award of attorney fees in this case is one peculiarly within the competence of the MSPB to resolve. Section 7701(g)(1) permits an award of fees by the MSPB, not the courts, and it is intended principally to compensate for legal services rendered in administrative proceedings. See *Olsen* v. *Department of Commerce*, 735 F.2d 558, 560 (Fed.

Cir. 1984). In addition, Section 7701(g)(1) does not apply in cases involving discrimination. In discrimination cases, Congress has specifically directed in 5 U.S.C. 7701(g)(2) that the payment of attorney fees shall be in accordance with the standards prescribed under Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). Thus, Section 7701 (g)(1), at issue here, applies only in administrative appeals in adverse action and other routine personnel cases that Congress has placed within the exclusive jurisdiction of the MSPB.

Moreover, this is a case in which "Congress has not directly addressed the precise question at issue" (*Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5)—the appropriate award of attorney fees under Section 7701(g)(1) where an employee was represented in administrative proceedings by salaried union counsel. The general terms of the text of Section 7701(g)(1) do not focus on that question, and, as petitioner concedes (Pet. 9-11), the legislative history is silent on that question as well. The appropriate inquiry therefore is "whether the agency's answer is based on a permissible construction of the statute" (*Chevron U.S.A., Inc.* v. *NRDC*, slip op. 5). In undertaking that inquiry, it is well settled that the construction of a statute by the agency charged with its execution should be sustained by a court unless there are "compelling indications" that it is wrong. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).[2] There are no such com-

[2] The Federal Circuit has applied these principles of deference to administrative construction in reviewing the MSPB's implementation of its statutory authority to direct the payment of attorney fees. See *Bennett* v. *Department of the Navy*, 699 F.2d 1140, 1146 (1983); *Sterner* v. *Department of the Army*, 711 F.2d 1563 (1983).

pelling indications here. To the contrary, the MSPB's approach is fully consistent with, and indeed is affirmatively supported by, the terms of Section 7701 (g)(1). Surely, an award that fully reimburses the union for its actual representation expenses yet does not trench on countervailing ethical concerns or result in a windfall to the union is a "reasonable" one, is tied to the fees actually "incurred," and "is warranted in the interest of justice." By the same token, the MSPB reasonably could conclude that an award in excess of that amount would not be appropriate under these same statutory standards. Cf. *Shepard* v. *NLRB*, 459 U.S. 344, 349, 352 (1983). Thus, the MSPB's choice " 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,' " and the court of appeals properly declined to disturb it. *Chevron U.S.A. Inc.* v. *NRDC*, slip op. 6-7, quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

2. Petitioner contends (Pet. 8-13), however, that the union is entitled to recover fees on the same basis as if this case arose under laws prohibiting discrimination. From this premise, and relying on this Court's recent decision in *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), he argues that the award of fees should have been based on prevailing market rates. This argument is without merit.

In *Blum* v. *Stenson*, the award of fees was governed by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. The legislative history of that particular statute established that Congress intended the award of fees to be based on prevailing market rates. See slip op. 5-8. Here, by contrast, as petitioner concedes (Pet. 9-11), the legislative history is silent regarding the manner in which fee awards under Section 7701(g)(1) should be com-

puted. Congress thus left it to the MSPB to fill in this and other gaps in the remedial scheme, taking into account the various statutory policies embodied in the Civil Service Reform Act. See *Chevron U.S.A. Inc.* v. *NRDC*, slip op. 4-5.

Despite this silence in the text and legislative history of Section 7701(g)(1), petitioner argues that Congress nevertheless intended to require the MSPB to follow the standards under the civil rights laws. The difficulty with this argument is that where Congress intended to require the MSPB to be bound by those standards, it expressly so provided. In Section 7701(g)(2), Congress provided that if an employee is the prevailing party and the decision is based on a finding of discrimination, "the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))." Congress's failure to incorporate those same standards in Section 7701(g)(1) indicates a deliberate congressional determination that the MSPB should *not* be rigidly bound by those standards in adverse action and other routine personnel cases arising under the civil service laws. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). See *Hodnick* v. *Federal Mediation and Conciliation Service*, 4 M.S.P.B. 431, 433 (1980).

There are sound reasons for the distinction Congress drew. A principal rationale for the award of attorney fees in cases of discrimination is to encourage and facilitate the institution of suits to protect and vindicate the civil rights at issue. The plaintiff in such a case serves as a "private attorney general." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983); *id.* at 442-446 (Brennan, J.,

concurring and dissenting); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-417 (1978). The award of fees based on a prevailing market rate standard can be viewed as a necessary incentive to the bringing of such suits. See, *e.g.*, *Copeland* v. *Marshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc).

However, as the court of appeals recognized in this case, there is no comparable congressional policy of broadly encouraging the institution of legal measures by federal employees challenging adverse personnel actions against them where those actions were taken on grounds other than discrimination. Thus, when compared to attorney fee provisions under the civil rights laws, the attorney fee provision in Section 7701 (g)(1) has the more modest goal of making employees whole for losses sustained by the personnel actions, and only in circumstances where an award is warranted in the interest of justice. Pet. App. 6a; *Wells* v. *Schweiker*, 12 M.S.P.B. at 330 n.2, 332-333; *Powell* v. *Department of the Treasury*, 8 M.S.P.B. at 27 & n.5; *O'Donnell* v. *Department of Interior*, 2 M.S.P.B. 604, 611 (1980). See also *Gragg* v. *United States*, 717 F.2d 1343, 1345-1346 (Fed. Cir. 1983); *Ramos* v. *United States*, 683 F.2d 396, 398-399 (Ct. Cl. 1982). The award of attorney fees in this case is fully consistent with this make-whole policy.[3] The District of Columbia Circuit drew a similar distinction between the antidiscrimination statutes and the

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[3] Furthermore, an award exceeding the union's actual cost of rendering legal services often would not be necessary to induce the union to prosecute suits on behalf of the employees it represents, because the union may have an independent responsibility to do so (cf. *Vaca* v. *Sipes*, 386 U.S. 171 (1967)) and its staff of salaried attorneys is assembled for that purpose.

Privacy Act of 1974 (5 U.S.C. 552a), observing that the latter Act "lacks any comparable background" and that its attorney fee provision "has the comparatively modest function of removing disincentives to the prosecution of individual actions." *NTEU* v. *Department of the Treasury*, 656 F.2d 848, 855 (D.C. Cir. 1981).

3. As the Federal Circuit also recognized (Pet. App. 3a-6a), the MSPB's decision in this case is supported by relevant ethical considerations and case law addressing those considerations. In *Powell* v. *Department of the Treasury*, *supra*, the MSPB relied upon the District of Columbia Circuit's decision in *NTEU* v. *Department of the Treasury*, *supra*, in concluding that the amount of the fee awarded under 5 U.S.C. 7701(g)(1) should be determined by the union lawyer's salary plus overhead expenses. See 8 M.S.P.B. at 25-28. In *NTEU*, the court explained that an award in a greater amount would violate the Code of Professional Responsibility (656 F.2d at 851-852 (footnotes omitted)):

> Quite conspicuously, the Code's strictures on the attorney's professional alliances strongly exert their influence here. Lawyers are free to accept employment by an organization offering a prepaid legal services plan to its members, but only if "[s]uch organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers . . . ." This restriction is closely related to two more of the Code's most fundamental prohibitions. Attorneys may not split fees with laymen or lay organizations, or enable them to engage in the unauthorized practice of law. Courts and bar groups alike have repeatedly endorsed these ethical maxims. We, too,

> recognize their inestimable value as safeguards against the imposition of incompetent and irresponsible law practice on the public.

See also *Munsey* v. *Federal Mine Safety & Health Review Commission*, 701 F.2d 976, 977 (D.C. Cir. 1983); *Wilderness Society* v. *Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974) (en banc), rev'd on other grounds *sub nom. Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Petitioner did not challenge the legitimacy of these ethical considerations in the court of appeals (see Pet. App. 4a) and does not appear to do so in this Court (see Pet. 14-17).

As the MSPB subsequently concluded in *Wells* v. *Schweiker*, these ethical concerns are not eliminated merely because the union channels its funding of legal representation activities through a separate account, since the payment of excess attorney fee awards into that account would relieve the union of its responsibility for financing a portion of its litigation out of general revenues. 12 M.S.P.B. at 330 n.2.[4] The court

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[4] In *NTEU*, the court expressly refrained from deciding whether the ethical problem presented by payment of market value attorney fee awards to unions would be resolved if the monies were directed to a fund for maintenance of a legal services program. 656 F.2d at 855. Petitioner asserts (Pet. 16) that this question was settled in *Jordan* v. *United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982). *Jordan* arose under the Freedom of Information Act. The district court denied an award of attorney fees for work performed by the legal staff of the Institute for Public Representation at Georgetown University Law Center because the application was not supported by appropriate documentation. The court of appeals reversed and, in passing, mentioned the *NTEU* decision in a footnote. 691 F.2d at 516 n.14. The court there simply stated that it "assume[d]" for purposes of the appeal that, should the Institute share in any attorney fee award beyond recoupment of its own expenses, it would maintain a

of appeals in this case was careful to point out, however, that a different result might obtain if a separate legal representation fund fully supported the union's legal services program (Pet. App. 6a).

Since a portion of AFGE's legal activities is furnished through use of the union's general revenues (see page 3, *supra*), payment of fees to the union on a market value basis would reduce the amount of general funds the union is required to expend to provide legal services for its members. Accordingly, the MSPB reasonably chose to follow its prior ruling in *Wells* in the circumstances of this case.[5]

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fund exclusively for litigation, into which its share would be deposited. The court noted that, in *NTEU*, the question whether such a separate fund would resolve the ethical questions was not presented. *Ibid.*

The *Jordan* decision does not make clear the fee relationship between the Institute and the attorneys representing Mr. Jordan or whether payment would be made to the Institute or directly to the lawyers. In any event, the question of a separate account was not presented in *Jordan*, just as it was not in *NTEU*, and we therefore cannot assume that the court intended to resolve it in so casual a manner in a footnote, since to do so would sanction a possible circumvention of the ethical concerns raised in *NTEU*.

In *Johnson* v. *Department of the Treasury*, No. SA-77-CA-5 (W.D. Tex. Sept. 24, 1981), an unpublished decision to which petitioner also refers (Pet. 8, 13), the district court held, without extended discussion, that a segregated litigation fund resolved the ethical problem identified by the District of Columbia Circuit in *NTEU*. However, that award apparently was not at issue on appeal. *Johnson* v. *Department of the Treasury*, 700 F.2d 971, 974 n.6 (5th Cir. 1983).

[5] Petitioner cites (Pet. 13, 14) the Federal Circuit's decision in *Devine* v. *Sutermeister*, 733 F.2d 892 (1984), in support of the proposition that attorney fees may be awarded to a lay organization on a market value basis. That case, however, involved an award by the Federal Circuit itself

It again should be borne in mind that this case does not involve an award of attorney fees to be paid to a union under a civil rights statute, including 5 U.S.C. 7701(g)(2). In such a case, it would be necessary to consider whether Congress, in determining that fees ordinarily should be awarded on the basis of the prevailing market rate, had overridden the ethical concerns that otherwise would weigh against such an arrangement.[6] But however that question might be resolved, there is no indication in the text or sparse legislative history of 5 U.S.C. 7701(g)(1) of a congressional intent to displace these established ethical restraints here. To the contrary, Section 7701(g)(1) authorizes the MSPB to require an agency to pay attorney fees to a prevailing federal employee only where "warranted in the interest of justice * * *." As a result, the MSPB did not abuse its discretion by taking ethical considerations into account in declining to require a windfall award here.

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under the Equal Access to Justice Act, 28 U.S.C. 2412, not an award by an administrative agency under a special statute it is charged with administering. Moreover, the ethical questions considered in *NTEU* and in the instant case were not addressed. The other decisions cited by petitioner (Pet. 7-8) likewise involved other statutes and, with one exception (see note 4, *supra*), did not address the ethical concerns. Indeed, in *Crawford* v. *American Federation of Government Employees*, 576 F. Supp. 812 (D.D.C. 1983), the attorney fees apparently were awarded under Fed. R. Civ. P. 37 to the union as a *party*, not for services rendered by its attorneys. 576 F. Supp. at 816.

[6] *Blum* v. *Stenson* did not raise these ethical concerns, because the attorney fees were to be paid to the Legal Aid Society of New York, a nonprofit legal organization. Slip op. 3 n.3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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